

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**

08-13-07

11:28 AM

ARCO Products Company, Mobil Oil	)	
Corporation, Texaco Refining and Marketing,	)	
Inc., and Equilon Enterprises, LLC,	)	C. 97-04-025
Complainants,	)	
vs.	)	
Santa Fe Pacific Pipeline, L.P.,	)	
Defendant.	)	
<hr/>		
And Related Matters.	)	C. 00-04-013
	)	A. 00-03-044
	)	A. 03-02-027
	)	A. 04-11-017
	)	A. 06-01-015
	)	A. 06-08-028
	)	C. 06-12-031
<hr/>		

**RESPONSE OF SFPP, L.P. TO MOTION  
TO SUPPLEMENT BRIEFS WITH NEW AUTHORITY**

GOODIN, MACBRIDE, SQUERI, DAY &  
LAMPREY, LLP  
James D. Squeri  
505 Sansome Street, Suite 900  
San Francisco, CA 94111  
Telephone: (415) 392-7900  
Facsimile: (415) 398-4321  
E-Mail: [jsqueri@goodinmacbride.com](mailto:jsqueri@goodinmacbride.com)

Date: August 13, 2007

Attorneys for SFPP, L.P.

ARCO Products Company, Mobil Oil Corporation, Texaco Refining and Marketing, Inc., and Equilon Enterprises, LLC,	)	
Complainants,	)	C. 97-04-025
vs.	)	
Santa Fe Pacific Pipeline, L.P.,	)	
Defendant.	)	
	)	
And Related Matters.	)	C. 00-04-013
	)	A. 00-03-044
	)	A. 03-02-027
	)	A. 04-11-017
	)	A. 06-01-015
	)	A. 06-08-028
	)	C. 06-12-031
	)	

In accordance with Rule 11.1(e) of the Commission’s Rules of Practice and Procedure, SFPP, L.P. (“SFPP”) hereby submits its response to the “Motion to Supplement Briefs With New Authority” filed by ConocoPhillips Company, Chevron Products Company, Ultramar Inc. and Valero Marketing and Supply Company (collectively “CCUV”) dated July 31, 2007.

- 1 -

group used to determine the allowed return on equity (“ROE”) for natural gas and oil pipelines.<sup>1</sup> Its motion asks the Commission to give consideration to a *proposed* policy statement of the FERC that (i) is subject to comment and, presumably, revision prior to adoption by the FERC; and (ii) even assuming it is finalized as proposed, may or may not be applied to any pending FERC matters that have completed the hearing phase as of the date the FERC issues its final policy statement. The tentative policy pronouncements of the FERC are not ripe for consideration by the Commission with respect to the subject proceedings now submitted and pending before the Commission. Furthermore, CCUV’s assertion that the *proposed* policy statement supports CCUV’s recommendation to reduce SFPP’s rate of return in the 2003 proceedings is irrelevant. The existing evidentiary record upon which the Commission will make its decision discredits the theory upon which CCUV’s recommended reduction in SFPP’s cost of equity is based and requires its rejection.

It is, of course, well within the discretion of the Commission to give consideration to the policy statements of other governmental agencies, both state and federal, in formulating its own ratemaking policies and treatments. There is little reason, however, to give consideration to another agency’s tentative or proposed statements of policy that may or may not be ultimately endorsed and adopted by that agency. It would be even more peculiar for the Commission to retroactively apply the preliminary proposal of FERC to a submitted Commission matter while FERC itself has expressly indicated that once it issues its final policy statement it will determine, on a case-by-case basis, whether to apply its newly adopted policy to matters that have already been the subject of hearing.<sup>2</sup>

---

<sup>1</sup> *Proposed Policy Statement*, 120 FERC ¶61,068; WL 2064673 (F.E.R.C.) as attached to CCUV’s motion.

<sup>2</sup> *Proposed Policy Statement*, 120 FERC ¶61,068 at P 1. The hearing phase in the subject proceeding has obviously been completed prior to the date on which the FERC will issue its final policy statement. The final policy statement, whatever it ultimately turns out to be, will apply to FERC rate cases in which

(footnote continued)

As to the substance of the motion, it is irrelevant that the *proposed* policy statement is contemplating a standard adjustment to the proxy yields of MLPs which is the same adjustment proposed by CCUV's witness in the subject proceedings. The theory upon which the proposed adjustment is premised, i.e. that cash distributions in excess of reported earnings constitute a return of capital, is entirely belied and contradicted by the record in the subject proceedings which shows unequivocally that invested capital in SFPP has increased even while cash distributions have exceeded earnings.

The specific adjustment under consideration by the FERC would cap the "dividend" (cash distributions by an MLP to its unit holders) used in the DCF analysis at the pipeline's reported earnings, thus potentially reducing the amount of the distribution to be included in the DCF model used by the FERC to develop a range of returns earned on investment applicable to oil pipelines. In proposing to cap the "dividend" at reported earnings, FERC indicated that its primary concern is that a DCF analysis that includes MLPs in the proxy group should only reflect cash distributions/dividends that constitute a return on capital, excluding any portion of cash distributions/dividends that represents a return of capital.<sup>3</sup> The *Proposed Policy Statement* then assumes in circumstances in which an MLP makes cash distributions in excess of earnings that the difference between the distributions and reported earnings constitutes a return of capital, rather than a return on capital, which should be excluded from the DCF analysis.<sup>4</sup>

The FERC proposal to cap "dividends" at the level of an MLP's reported earnings, as well as the assumption/rationale that supports the proposed ratemaking adjustment, are matters of significant controversy and disagreement. Comments in response to the *Proposed*

---

hearings are scheduled after the date of issuance of the final policy statement. FERC will decide on a case-by-case basis whether to apply the final policy statement in cases that have completed the hearing phase.

<sup>3</sup> *Proposed Policy Statement*, 120 FERC ¶61,068 at P 7.

<sup>4</sup> *Id.*

*Policy Statement* are expected to reflect various concerns with respect to capping dividends included in the DCF analysis at the level of reported earnings, including the following:

- A cap on distributions may understate an MLP's true return on equity. Whether called dividends or distributions, the unit holder receives cash and that level of cash receipts, along with the market's (reflected at the investor level) perception of growth, determines the market price of a unit. If the market thinks capital is being returned and that growth will therefore be slowed or stopped in the future, the market price of the unit will be adjusted accordingly. A cap would not be market based and, if applied, would understate the market.
- Earnings measures are accounting constructs. While they indicate firm performance, they do not directly influence investing and financial decisions. Cash flow, not earnings, directly fund investment and distributions. This distinction is particularly pronounced in an industry such as pipelines, in which a large portion of company assets are long-lived, because depreciation charges reduce earnings but have no effect on cash from operations.
- Despite FERC's stated assumption that distributions in excess of earnings reflect a return of capital, it is a demonstrable fact that MLPs that make cash distributions in excess of annual earnings are robust and thriving, contrary to the result that a steady return of capital would imply.

The last point is particularly significant in that it mirrors the evidence of record in the submitted proceedings that are the subject of CCUV's motion. The record evidence in the subject proceeding directly addresses and discredits the assumption in the *Proposed Policy Statement* that MLP distributions in excess of reported earnings constitute a return of capital rather than a return on capital.

The theory that cash distributions represent a return of capital and that distributions cannot possibly grow as fast as earnings is contradicted by the facts of record, as demonstrated by financial data from five MLPs, including five years' earnings per unit and five years of distributions per unit and the payout ratio indicated by these five-year totals. Contrary to the contention of CCUV's witness that the earnings must fall as the result of distributions in excess of earnings, earnings growth for four of the five MLPs was quite substantial.

Distributions per unit for all five companies also grew from 1998 to 2002. The book value per unit for each of the five companies was also tabulated for each year-end. For each company, the percentage change in the book value per unit from the end of 1998 to the end of 2002 reflected substantial growth over four years, ranging from 19% to 39%. Cash distributions in excess of reported earnings did not, as assumed by CCUV's witness and the FERC *Proposed Policy Statement*, result in a return of capital, i.e. a decline in investment per unit. Finally, data reflecting the year-end closing unit price for each company and for each year shows an increase, including an increase of 93% for Kinder Morgan Energy Partners, LP, the entity which owns SFPP.<sup>5</sup> In short, there is no evidentiary support for the theory that distribution by MLPs of cash in excess of earnings will cause a reduction in investors' investment, a decline in earnings per unit, and a decline in distributions.

It is simply premature for the Commission to give any consideration to *Proposed Policy Statement*. Common sense suggests the Commission should await the issuance by FERC of its final policy statement. Furthermore, even if the *Proposed Policy Statement* were to be adopted by the FERC "as is" and even if it were then to be retroactively applied to the matters now pending before the Commission, the record evidence would require rejection of any proposal to reduce SFPP's return on equity based on the thoroughly discredited theory that distributions in excess of reported earnings reflect a return of capital.

Accordingly, CCUV's "Motion To Supplement Briefs with New Authority" should be denied.

---

<sup>5</sup> Ex. 103A; Prepared Rebuttal Testimony of J. Peter Williamson; also see SFPP Reply Brief dated February 24, 2004 at 27.

Respectfully submitted this 13th day of August, 2007 at San Francisco,  
California.

GOODIN, MACBRIDE, SQUERI, DAY &  
LAMPREY, LLP  
James D. Squeri  
505 Sansome Street, Suite 900  
San Francisco, California 94111  
Telephone: (415) 392-7900  
Facsimile: (415) 398-4321  
E-Mail: [jsqueri@goodinmacbride.com](mailto:jsqueri@goodinmacbride.com)

By /s/ James D. Squeri  
James D. Squeri

Attorneys for SFPP, L.P.

2539/001/X91447.v1

**CERTIFICATE OF SERVICE**

I, Lisa Vieland, certify that I have on this 13<sup>th</sup> day of August 2007 caused a copy of the foregoing

**RESPONSE OF SFPP, L.P. TO MOTION TO SUPPLEMENT BRIEFS  
WITH NEW AUTHORITY**

to be served on all known parties to listed C.97-04-025, C.00-04-013, A.00-03-044, A.03-02-027, A.04-11-017, A.06-01-015, A.06-08-028 & C. 06-12-031 on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

Commissioner, President Michael R. Peevey  
California Public Utilities Commission  
State Building, Room 5218  
505 Van Ness Avenue  
San Francisco, CA 94102

ALJ Douglas M. Long  
California Public Utilities Commission  
State Building, Room 4012  
505 Van Ness Avenue  
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 13<sup>th</sup> day of August 2007 at San Francisco, California.

/s/ Lisa Vieland  
Lisa Vieland



Service List - Last Updated 8/6/07  
C.97-04025, C.00-04-013, A.00-03-044, A.03-02-027,  
A.04-11-017, A.06-01-015, A.06-08-028, C.06-12-031

JOHN B MERRITT  
TRAVIS & GOOCH  
Exxon-Mobil & BP  
34820 N DESERT RIDGE DR.  
SCOTTSDALE, AZ 05282-1104

RICHARD E. POWERS, JR.  
repowers@venable.com

STEVEN A. ADDUCCI  
saadducci@venable.com

MARK R. HASKELL  
ATTORNEY AT LAW  
TRAVIS & GOOCH  
SUITE 1010  
1101 15TH STREET, N.W.  
WASHINGTON, DC 20005-5002

ELISABETH R. MYERS  
emyers@blackwellsanders.com

GEROGE L. WEBER  
WEBER & ASSOCIATES, P.C.  
Chevron Texaco Products Company  
SUITE 600  
1000 CONNECTICUT AVEUNE., N.W.  
WASHINGTON, DC 20036

MARCUS W. SISK, JR  
DORSEY & WHITNEY LLP  
ConocoPhillips Company  
SUITE 1250  
1050 CONNECTICUT AVENUE, N.W.  
WASHINGTON, DC 20036

MATTHEW A. CORCORAN  
mcorcoran@goldstein-law.com

MELVIN GOLDSTEIN  
mgoldstein@goldstein-law.com

ROBERT W. KNEISLEY  
ASSOCIATE GENERAL COUNSEL  
SOUTHWEST AIRLINES CO.  
1901 L STREET, N.W., SUITE 640  
WASHINGTON, DC 20036

R. GORDON GOOCH  
gordon\_gooch@earthlink.net

ANDREW J. DALTON  
VALERO ENERGY COMPANY  
ONE VALERO PLACE, ROOM 264  
SAN ANTONIO, TX 78212-3186

BARRON DOWLING  
bdowling@tsocorp.com

CHARLES FERGUSON  
ferguson.charles@dorsey.com

JAMES D. SQUERI  
jsqueri@goodinmacbride.com

JEFFREY P. GRAY  
jeffgray@dwt.com

D. T. SHERMAN  
ASSOCIATE GENERAL COUNSEL  
CHEVRON PRODUCTS COMPANY  
PO BOX 5044  
SAN RAMON, CA 94583

GLENN S. BENSON  
ATTORNEY AT LAW  
TEXACO, REFINING AND  
MARKETING, INC.,  
1101 15TH STREET N W SUITE 1010  
WASHINGTON, DC 20005

FREDERICK G. JAUSS IV  
DORSEY & WHITNEY LLP  
WASHINGTON SQUARE  
1050 CONNECTICUT AVE., N.W.,  
SUITE 1250  
WASHINGTON, DC 20036

NOREEN M. TAMA  
noreen.m.tama@exxonmobil.com

JENNIFER LIGHT MCGRATH  
MOBIL OIL CORPORATION  
3225 GALLOWES ROAD, ROOM 8B115  
FAIRFAX, VA 22037-0001

THOMAS A. NOTO  
ATTORNEY AT LAW  
MOBIL OIL CORPORATION  
ROOM 8B313  
3225 GALLOWES ROAD  
FAIRFAX, VA 22038-0001

BARBARA HICKEL  
EQUILON ENTERPRISES  
Equilon Enterprises  
910 LOUISIANA  
HOUSTON, TX 77210

ELIZABETH E. ATLEE  
Elizabeth.atlee@bp.com

JOHN BURKHOLDER  
burkee@cts.com

BRUCE FOSTER  
bruce.foster@sce.com

EDWARD W. O'NEILL  
edwardoneill@dwt.com

JUDY PAU  
judypau@dwt.com

DOUG GARRETT  
COX CALIFORNIA TELCOM, LLC  
2200 POWELL STREET, SUITE 1035  
EMERYVILLE, CA 94608-2618

PAUL M. PREMO  
paulpremo@msn.com

RONALD BROBERG  
PRESIDENT  
TRUCKING SUPPORT SERVICES  
TEAM  
PO BOX 1608  
PLACERVILLE, CA 95667

LARRY E. FARRENS  
CALIFORNIA TRUCKING  
ASSOCIATION  
3251 BEACON BOULEVARD  
WEST SACRAMENTO, CA 95691

ANDREW BROWN  
abb@eslawfirm.com

SCOTT BLAISING  
blaising@braunlegal.com

Vahak Petrossian  
vap@cpuc.ca.gov

Douglas M. Long  
dug@cpuc.ca.gov

Maurice Monson  
mdm@cpuc.ca.gov

Paul Wuerstle  
pww@cpuc.ca.gov

PUC/X91602.v1